

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID MARK COLE,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 298893

Muskegon Circuit Court

LC No. 09-057782-FH

Before: CAVANAGH, P.J., and STEPHENS and KRAUSE, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (child under 13 years of age) (“CSC II”).¹ Defendant was sentenced to five to 15 years in prison and lifetime electronic monitoring. The trial court denied defendant’s motion to amend the judgment of sentence or to allow withdrawal of the plea. This Court granted defendant’s delayed application for leave to appeal. We reverse and remand to afford defendant an opportunity to withdraw his plea to the two charges of CSC II.

Defendant entered his pleas in exchange for a sentence agreement of a “five year cap on the minimum as to all charges” and concurrent sentences. However, MCL 750.520n provides:

A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age *shall be sentenced* to lifetime electronic monitoring. . . .
[Emphasis added.]

¹ Defendant also pleaded nolo contendere to two counts of possession of child sexually abusive material, MCL 750.145c(4), and two counts of use of a computer to commit a crime, MCL 752.797(3)(d), in a separate case. His sentences for these offenses were to run concurrently with the sentences in the instant case. Defendant has challenged his sentences for the possession of child sexually abusive material convictions in Court of Appeals Docket No. 294836.

Defendant was sentenced accordingly. He now argues that he should be entitled to an amendment of the judgment or to withdraw his plea because he was not advised of “the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law,” as required by MCR 6.302(B)(2). Further, he asserts that the sentence was unfair and that it violated his *Cobbs*² agreement. The trial court concluded that the lack of notice was not fundamentally unfair, and that there was no violation of MCR 6.302(B)(2) because the mandatory lifetime electronic monitoring was not a “minimum” sentence.

While a decision on a motion to withdraw a plea after sentencing is reviewed for an abuse of discretion, underlying questions of law are reviewed de novo. *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006). Moreover, the interpretation and application of a court rule is reviewed de novo. *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 338; 785 NW2d 45 (2010).

We agree that mandatory lifetime electronic monitoring was not a “minimum” sentence under MCR 6.302(B)(2).

The same legal principles that govern the construction and application of statutes apply to court rules. . . . When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. . . . [*People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009) (citation omitted).]

In *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010), our Supreme Court noted:

When a statute is ambiguous, judicial construction is appropriate to determine the statute’s meaning. [*Frankenmuth Mut Ins Co v Marlette Homes, Inc.*, 456 Mich 511, 515; 573 NW2d 611 (1998)]. When determining the Legislature’s intent, the “‘statutory language is given the reasonable construction that best accomplishes the purpose of the statute.’” *Id.* (citation omitted).”

Notably, “‘unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used.’” *McManus v Toler*, ___ Mich App ___, ___ NW2d ___ (Docket No. 240249, pub’d July 27, 2010, at 9:00 a.m.), slip op at 2, quoting *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002).

The phrase “any mandatory minimum sentence required by law” is ambiguous within the context of MCR 6.203(B)(2). To the extent lifetime electronic monitoring is required, it is a “minimum” requirement. However, Michigan’s indeterminate sentencing scheme requires both a minimum and maximum sentence. MCL 769.9; MCL 769.8(1). MCL 769.9(3) describes a mandatory minimum sentence, referencing required sentences for certain major controlled substance offenses. These statutes indicate that when the court rule refers to “the maximum

² *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

possible prison sentence for the offense and any mandatory minimum sentence required by law” it is speaking of such a mandatory minimum sentence. The plain and ordinary meaning of the term “mandatory minimum sentence”, as used in context in MCR 6.302(B)(2), indicates that the term refers to a mandatory minimum *prison* sentence imposed as part of an indeterminate sentence.

Nonetheless, MCR 6.302(A) requires that a plea be “understanding” and “voluntary”. In *People v Boatman*, 273 Mich App 405; 730 NW2d 251 (2006), this Court concluded that the phrase “maximum possible prison sentence for the offense” as used in MCR 6.302(B)(2) did not require that a defendant be advised of the maximum sentence as provided by the habitual offender statute, since habitual offender status was not a substantive “offense.” Nonetheless, the *Boatman* Court noted that a plea must be voluntary, knowing and understanding. It observed that there would be a 13-year difference in the minimum sentence depending on whether the regular or habitual offender guidelines were used. It found that the failure to specify that the guidelines applicable to habitual offenders would be used compromised the assurance that the plea would reflect an “‘understanding’ of the consequences of a plea,” “rendering it unintelligent.” *Id.* at 411-412.

Here, defendant entered his plea with the understanding that his sentences would be concurrent and subject to a five-year cap. However, his sentence included the provision that he be subject to lifetime electronic monitoring; MCL 750.520n characterizes lifetime electronic monitoring as a sentence. Moreover, being on a tether or subject to a comparable device is generally regarded as an alternative to jail or prison. The electronic monitoring was not a collateral consequence of the plea or sentence, but part of the sentence. Since defendant was not cognizant that lifetime electronic monitoring would be part of his sentence, we conclude that he could not have entered a knowing, intelligent, and understanding plea.

For similar reasons, defendant should be permitted to withdraw his plea since it did not conform to the *Cobbs* agreement. The *Cobbs* Court stated:

At the request of a party, and not on the judge’s own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

To avoid the potential for coercion, a judge must not state or imply alternative sentencing possibilities on the basis of future procedural choices, such as an exercise of the defendant’s right to trial by jury or by the court.

The judge’s preliminary evaluation of the case does not bind the judge’s sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. However, a defendant who pleads guilty or nolo contendere in reliance upon a judge’s preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. [*Cobbs*, 443 Mich at 283 (footnotes omitted; underlined emphasis added).]

Here, the trial court and the prosecutor expressly referred to a *Cobbs* agreement at the plea proceeding. The sentence to lifetime electronic monitoring exceeded the preliminary evaluation set forth during the plea proceeding. Thus, under *Cobbs*, defendant had an absolute right to withdraw his plea.

Reversed and remanded to afford defendant an opportunity to withdraw his plea to the two CSC II charges. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh